

*United States Court of Appeals
for the Second Circuit*



APPELLEE'S BRIEF

74-1735

To be argued by
JANIS G. SCHULMEISTERS

United States Court of Appeals
FOR THE SECOND CIRCUIT
Docket No. 74-1735

EMPIRE TRANSPORT, INC., as owner of the
STEAMSHIP POTOMAC,

Plaintiff Appellant,
—against—

UNITED STATES OF AMERICA,
Defendant Appellee.

BRIEF FOR APPELLEE UNITED STATES OF AMERICA

CARLA A. HILLS
Assistant Attorney General

PAUL J. CURRAN
United States Attorney

GILBERT S. FLEISCHER
Attorney in Charge
Admiralty and Shipping Section
New York

JANIS G. SCHULMEISTERS
Attorney
Admiralty and Shipping Section
New York
Department of Justice
Attorneys for the United States
of America

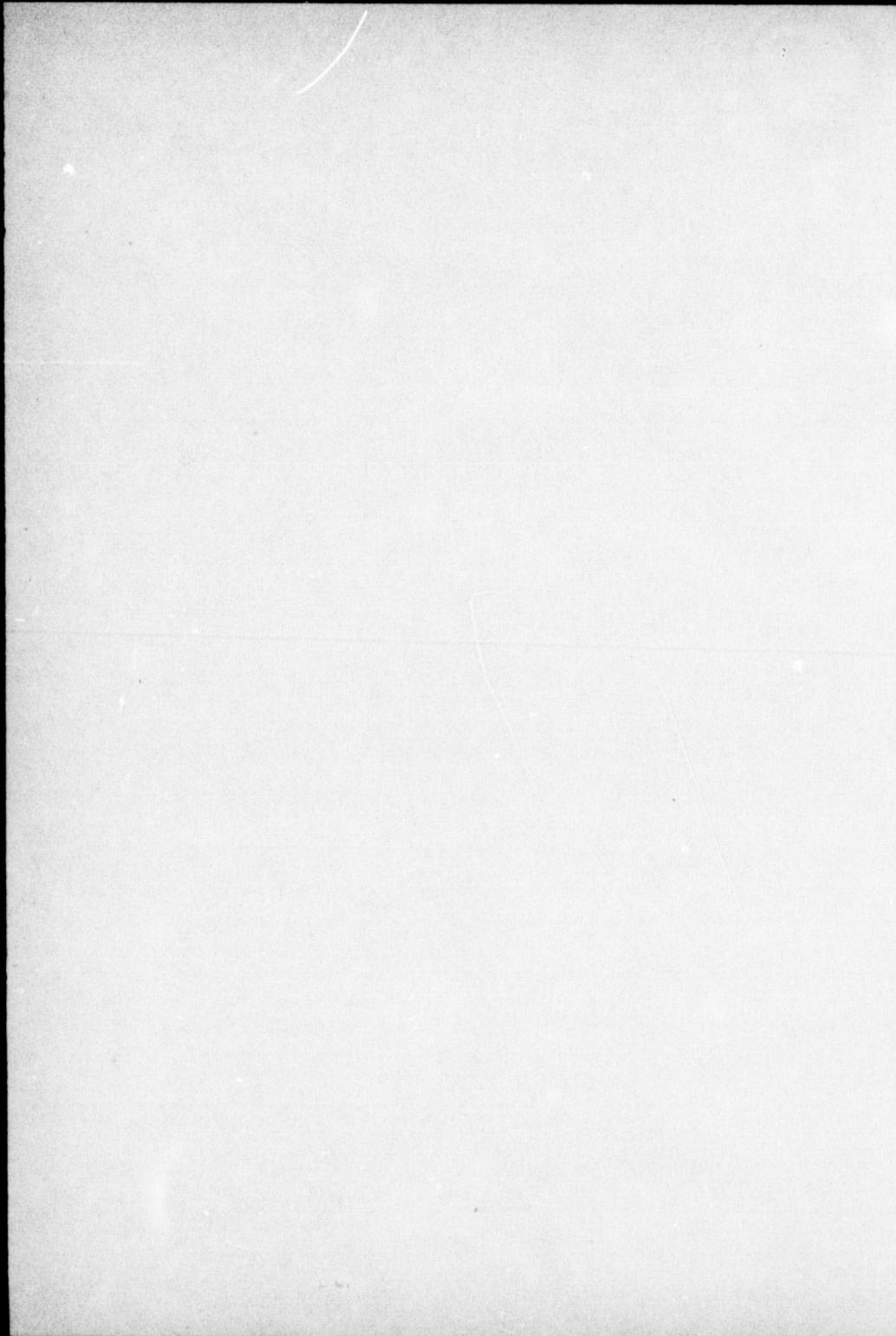


TABLE OF CONTENTS

	PAGE
Statement	1
Counterstatement of the Issues	2
Summary of Contentions	3
Counterstatement of the Facts	4
I. The District Court correctly found that the stranding was solely caused by the negligence of the POTOMAC's master and watch officer. (Answering appellant's Points I, II, IV and V)	10
II. The District Court did not err in finding that the POTOMAC failed to use the proper charts for approaching Casablanca, and that she proceeded at an imprudently excessive speed (Answering appellant's Points III and VI)	23
CONCLUSION	29

CASES CITED

<i>American President Lines, Ltd. v. Towboat Seneca,</i> 384 F.2d 511, 514-515 (2d Cir. 1967)	25
<i>Aurania, The, and The Republic</i> , 29 Fed. 98, 125 (SD NY 1886)	21
<i>Chemical Transporter, Inc. v. M. Turecamo, Inc.</i> , 290 F.2d 496, 497-498 (2d Cir. 1961)	21
<i>Cornelius Vanderbilt, The</i> , 120 F.2d 766, 768 (2d Cir. 1941)	21
<i>Crawford v. Indian Towing Company</i> , 240 F.2d 308, 311 (5th Cir. 1957)	21

PAGE

<i>Lady Nelson v. Creole Petroleum Corporation</i> , 224 F.2d 591, 594 (2d Cir. 1955), cert. den., 350 U.S. 935 (1956)	21
<i>Larsen v. Cahill Towing Line</i> , 6 F.2d 982, 983 (2d Cir. 1925)	16
<i>Laura v. Rose, The</i> , 28 Fed. 104, 108 (SDNY 1886)	21
<i>Marine Sulphur Queen, In re</i> , 460 F.2d 89, 97-98 (2d Cir. 1972)	21
<i>McAllister v. United States</i> , 348 U.S. 19 (1954)	23
<i>Sanday, The</i> , 122 F.2d 325 (2d Cir. 1941)	21
<i>Tebbs v. Baker-Whiteley Towing Co.</i> , 271 F. Supp. 529, 538 (D.C. Md. 1967), aff'd, 407 F.2d 1055 (4th Cir. 1969)	14
<i>Warner Barnes & Co. v. Kokosai Kisen Kabushiki Kaisha</i> , 102 F.2d 450, 453 (2d Cir. 1939)	15, 16

RULES

Rule 60(a) of the Federal Rules of Civil Procedure	25
----------------------------------------------------------------	----

TEXT

<i>Griffin on Collision</i> , § 259, p. 596	21
---------------------------------------------------	----

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 74-1735

**EMPIRE TRANSPORT, INC., as owner of the
STEAMSHIP POTOMAC,**
Plaintiff-Appellant,

—against—

UNITED STATES OF AMERICA,
Defendant-Appellee.

BRIEF FOR APPELLEE UNITED STATES OF AMERICA

Statement

The appellant's brief ignores certain basic facts established below:—that the SS POTOMAC on February 26, 1972 stranded in compulsory pilotage waters of the harbor of Casablanca, Morocco, while navigating without a pilot; that the vessel's master navigated in violation of local regulations, the applicable buoyage system and good seamanship; that he failed to use the proper approach chart and ignored warnings in his Sailing Directions and specific cable instructions regarding pilotage.

Thus, the POTOMAC stranded on uncharted concrete blocks placed there by the Moroccans during the construction or maintenance of the breakwater in the territorial waters of Morocco, which understandably the United States Defense Mapping Agency (DMA) never surveyed. Despite

the POTOMAC's attempt to create a contrary impression, the concrete blocks do not appear on any chart of the world, even upon the charts of foreign countries that have surveyed Casablanca waters (Lechartier 81a; Exs. D, 461a; KK, 497a; 13, 313a).* The American harbor chart, printed in 1966, clearly states on its face that it is "From French surveys to 1920 with additions from a French chart of 1955", the British Admiralty Chart 860 and miscellaneous data, some received from mariners. Nevertheless, the appellant seeks to foist liability on the United States for not including on its chart unofficial, unconfirmed (even contradicted) information which, however, was published in the Sailing Directions, carried on board the POTOMAC.

In any event, if the POTOMAC had used the available approach chart, taken the compulsory pilot, or even contacted the pilot station, as instructed to do by cable, she would not have been anywhere near the uncharted blocks.

Counterstatement of the Issues

The real issues in this case are:

- a) Whether, under the circumstances of this case, the District Court correctly held the POTOMAC's navigators negligent for their utter disregard of the information they had available in their Sailing Directions, on their charts and other publications, and most importantly, for their failure to contact by radio telephone the Casablanca pilot station as specifically instructed.

* References by witness name or exhibit number (Ex.) followed by "a" refer to the joint appendix; references preceded by "dep." or "Tr." refer to depositions or the trial record respectively, not reproduced in the appendix.

Also, it is respectfully requested that the Court refer to the original chart exhibits as most copies in the joint appendix are in black and white, some are partially reduced and on some all the markings are not fully legible on the reproductions.

b) Whether navigators may rely solely upon a single DMA chart of foreign territorial waters, which patently is based on old foreign surveys, without referring to other available information (such as cable instructions, Sailing Directions, approach charts, published buoy system charts and standard navigation texts), or whether the DMA is to be held liable for not charting unconfirmed unofficial information within compulsory pilotage waters of a foreign country, which was not shown on any other chart in existence.

Summary of Contentions

The District Court correctly found that the many negligent acts of the POTOMAC's navigators were the sole cause for her stranding, and the DMA was not negligent as it had published all the necessary information to enable the POTOMAC to properly and safely reach the pilot station and even to enter the harbor of Casablanca. The appellant's pleading for additional notices to mariners is untenable, as the POTOMAC's navigators did not enter the notice to mariners corrections on their harbor chart that were issued in the first week of January 1972 following the DMA's December 1971 review of the latest French chart (McLoud 163a-165a; see Ex. 14, 316a; Ex. 109 the notice and the absence of those corrections on the POTOMAC's harbor chart Ex. D, 461a).

The PCTOMAC's many negligent acts included:

- (a) The failure to wait for and take a compulsory pilot.
- (b) The failure to contact the pilot station as instructed by cable to do so.
- (c) The failure to even attempt to ascertain the applicable buoyage system.

(d) The failure to use the proper charts, even though they were on board and available.

(e) The failure to heed warnings printed in the Sailing Directions.

(f) Improper approach to and the use of excessive speed while approaching and attempting to enter Casablanca Harbor, contrary to good seamanship and local regulations.

Counterstatement of the Facts

Appellant's omission of a number of pertinent facts requires their restatement.

The SS POTOMAC owned by the appellant is 572 feet long, 75 feet wide and is driven by a steam engine that turns a propeller pitched to 17.5 feet (Ex. O, Hansen 228a). She is of 13,858 gross tons, and at material times carried 22,637 long tons of cargo, thus having a total weight of nearly 36,500 tons (Ex. O, see 581a-582a).

Casablanca harbor is an artificial harbor sheltered by a breakwater called Jetee Delure (hereinafter, "the jetty" or "the breakwater") that extends from the western part of Casablanca in a general northeasterly direction for a distance of approximately two miles. The outer extremity of the breakwater is submerged and a little further to the northeast, in line with the breakwater, is a black lighted whistle buoy, CA5 (Exs. 2, 305a; 13A, 314a; D, 461a; J, 427a; KK, 496a; and H, 469a-470a). To the east of buoy CA5 is the entrance range of 228° true; and north of buoy CA5 are two other approach buoys directly in line, CA3 one and one-half miles out and CA1 three miles out (See the approach chart, Ex. R, the harbor chart Ex. D and the entrance range appearing on both charts and labelled with letter "R" on Ex. R).

The United States has never surveyed the harbor of Casablanca, and the French and English are the primary and secondary sources for hydrographers and cartographers of North Africa, because Morocco does not publish navigation charts or sailing directions (McLoud 104a-105a; Ex. 106 Anderson dep. p. 110). Thus, the American charts, prepared by the DMA, state on their face that they are based on foreign charts and/or surveys (see Exs. D and R, 461a, 477a). More specifically, the harbor chart, Ex. D, designated No. 51222 (formerly H.O. 3777) states on its face that it is "from French surveys to 1920 with additions from a French chart of 1955" (461a). It also refers to the British Admiralty chart and miscellaneous data. On the lower left hand corner it shows the printing date of May 23, 1966 and on the lower right hand side is stamped the latest notice to mariners correction applied to the chart—December 11, 1971. The mariner then has to add the subsequent changes, but the POTOMAC's navigators did not add the latest correction published in the first week of January 1972, although it dealt with two shoals and a light change in Casablanca harbor (McLoud 122a-123a, 163a-165a; Ex. 109; Ex. 14, 316a).

To properly approach and enter Casablanca harbor, navigators using American charts should use two charts: The approach chart No. 51220 (formerly H.O. 3776), Ex. R, and the harbor chart No. 51222 (formerly H.O. 3777), Ex. D (Wadleigh 37a-41a; McLoud 138a, 165a-166a). This is so because the approach chart, Ex. R, shows an approach line with buoys CA1, CA3, CA5 and the entrance range starting north and to the east and then entering south of CA5, whereas the harbor chart, Ex. D, only shows buoy CA5 and the entrance range, being an enlargement of the area or a so-called larger scale harbor chart (Cf. Exs. D and R; see Hunziker 414a-415a; McLoud 165a-166a). The POTOMAC's navigators, however, did not use the approach chart—they used a much smaller scale ocean depth curve

chart 51013 which does not show the buoys nor the entrance range (Hunziker 407a-408a; Hansen 248a-250a, Tr. 220-221).

Charts show the colors of buoys, but not what buoyage system applies in a country (Wadleigh 34a-35a). The fact that there are different buoyage systems around the world is shown in Bowditch, Ex. B, although the POTOMAC's master, Hansen, did not want to admit it (see Ex. B, 450a-456a; cf. Hansen 207a and 264a). Hansen also had seen on board the POTOMAC Ex. 103 (327a), one of a set of four DMA published pilot charts that show the buoyage systems around the world, and particularly France and Morocco; and he admitted that such a pilot chart would be kept together with other navigational equipment (Hansen 243a-244a). POTOMAC's expert Wadleigh agreed that such a pilot chart would be preserved (Wadleigh 42a-45a, 54a-55a). Particularly on a "tramp" ship like the POTOMAC (Wadleigh 43a-44a; Hansen 264a). Moreover, Hansen admitted knowledge that in most European countries and in France the buoyage system calls for leaving a black buoy to starboard when entering (the opposite of the American system) and that Morocco had been a French colony (Hansen 529a, 531a). Also, Bowditch warns that "(The American system) does not always apply to foreign waters" (457a). However, Captain Hansen and watch officer Hunziker, never having been to Casablanca, did not attempt to find out what buoyage system applied (Hansen 191a, 530; Hunziker 404a, 410a).

Thus, when Hansen attempted to enter Casablanca harbor by passing between the breakwater and buoy CA5 to port, he violated the applicable buoyage system.

In addition to the graphic representations on the approach and the harbor charts the POTOMAC's navigators had the following warnings in DMA published Sailing Directions, Ex. H (469a-471a):

- (a) " * * * the outer extremity of the breakwater is submerged for a distance of 400 yards * * *
- (b) "Entrance range lights have been established at Casablanca. * * * The rear range light is located about 875 yards 228° from the front light * * * [the range appearing on charts 51220 and 51222].
- (c) "A lighted whistle buoy, equipped with a radar reflector, is moored close off the seaward extremity of the submerged section of the breakwater forming the outer portion of Jetee DeLure. (Sec. 9-39)
- (d) "Pilotage is compulsory between the Table d'Aukasha and bounded on the north by a parallel of 33°37'40" N. Pilots are available day and night.
* * * * *

Should bad weather and the state of the sea prevent the pilot from coming out, vessels may enter the port at their own risk and the pilot will await them in the shelter of Jetee DeLure. (Sec. 9-43)

- (e) "A signal station is located on the grain elevator on Mole Du Commerce.

* * * * *

Vessels can communicate by day or by night by the International Code." (Sec. 9-44).

Neither Hansen nor Hunziker measured on the chart the 400 yard submerged section mentioned in the Sailing Directions although the harbor chart was printed in 1966 and contained a notation at the end of the breakwater: "work in progress" (Hansen 218a; Hunziker 419a-420a; see Ex. D). Later Hansen admitted:

"If I had stepped off and noticed the extension was 400 yards I wouldn't have gone in . . ." (221a).

Also, Hansen admitted that he understood that buoy CA5 is the "lighted whistle buoy . . . moored close off the

seaward extremity of the submerged section of the breakwater . . ." referred to in the Sailing Directions (Hansen 536a). There is no other buoy there (see Ex. D).

More importantly, the Sailing Directions correctly informed the mariner of the moroccan Vizerial Order of February 20, 1967, which established the northern limit of the compulsory pilotage area at 33°37'40" north latitude and further provided:

"Article 2. A captain entering the area of compulsory pilot services shall signal for a pilot immediately and shall maintain the signal until the pilot arrives." * (Ex. MM and the translation Ex. MM-1, 498a).

Furthermore, the POTOMAC ignored specific cable instructions to contact the pilot station. On the morning of February 26, at 1103 hours, Captain Hansen received a cable advising him to "please keep contact as from 1300 with pilot station channel 12 VHF stop pilot boarding buoy CA5" (Ex. V5, 482a). The ship did not have a VHF but did have a radio telephone and had had radio telephone conversations with the agent (Hansen 203a, 204a, 525a, 545a).

* The appellant's assertion on page 26 of its brief that Casablanca "pilotage is essentially harbor pilotage" by translating from the French Sailing Directions is plainly misleading. Witness Lechartier translated from Exhibit 16 (72a) which is the French Africa Pilot 1959 edition (see the exhibit and the exhibit designation filed by the appellant). Clearly the 1967 Vizerial Order came later and its translation is in the joint appendix. Also, a translation of the French 1970 Sailing Directions, Ex. 15, is reproduced in the appendix (819a-823a; See Tr. 11-12) and says nothing about pilotage being "harbor pilotage"; and as other evidence shows, Casablanca pilots do go outside and north of buoy CA5 (Jungerheld 280a-282a, 284a-295a; Ex. 2, 305a; Hansen 257a-258a).

At 1310 hours the ship received another cable advising it to "come closer buoy CA5 for enabling pilot" (Ex. V4). Since no contact had been made with the pilot station on the VFH, another cable was sent by the agent to Captain Hansen and received on the POTOMAC at 1515 hours:

"DESPITE DELAY DOING BEST FOR YOUR
BERTHING STOP PLEASE IMMEDIATELY
CONTACT PILOT THROUGH CASABLANCA
RADIO PHONE 755 15 REPEAT 755 15 STOP
REGARDS" (Ex. V-3, 480a).

The POTOMAC never contacted the Casablanca pilot station but fifteen minutes later, at 1530 hours, the POTOMAC three miles from the breakwater was still proceeding at 13 knots turning 90 revolutions per minute (RPM) on her propeller, and only then her engine speed was reduced to 80 RPM or 12 knots for full ahead maneuvering speed * (Hansen 204a-205a, 513a-514a, 245a, 551a; Hunziker 421a; Ex. E 463a). This is 1200 feet per minute through the water as there are 6080 feet in one nautical mile (Lechartier 95a). And this speed was continued for another 7 minutes when the engine was stopped for the first time at 1537 hours at a distance of 1.6 miles from the breakwater (Ex. K, 474a; see position marked "stop" on Ex. D, 461a; and marked "1537" on Ex. J, 473a). With the engine stopped the momentum of the vessel and cargo weighing 36,500 tons drove her forward until at 1541 hours, when the engine was again put forward at slow ahead for 40 RPM for a theoretical push of 6.9 to 7 knots, enough to proceed through the water at a speed of at least 6 knots,

* Knowing the propeller pitch of 17.5 feet we can compute the vessel's theoretical speed through the water at 13.8 knots using the formula propeller pitch x RPM x 60; to get the actual

6080

speed one applies the "slip" which for the voyage has been recorded as 14% (Ex. E page for February 25, 1972; Hansen 228a, 245a, 559a, 560a; Lechartier 95a-96a).

which speed was maintained until stranding at 1549 hours (Hansen 228a-229a; Ex. K, 478a). The average speed of the POTOMAC between the 1537 stop engines position and 1549 grounding was at least 8.7 knots (Hansen 259a).

Shortly after 1541 hours the mate Hunziker noticed the masts of an outbound vessel behind the breakwater and reported it to Captain Hansen (Hunziker 441a-443a; see positions marked 1 and 1' in green on Exhibit J, 473a). Instead of slowing down and waiting for the outbound vessel to pass, and for the compulsory pilot to arrive, Hansen continued to force an entry into the harbor, passed between the black buoy CA5 and the breakwater and stranded 400 yards from the visible breakwater (Exs. D and J; Log entry Ex. E, 463a; Hansen 325a).

The ship's course had originally been shaped up with buoy CA5 fine on the starboard bow and the mate Hunziker thought they were going to enter leaving CA5 to starboard (Hunziker 438a, 439a). The turn to right was due to Captain Hansen's hurry to get into the harbor and his failure to contact the pilot station, his failure to wait for the pilot and due to the vessel's excessive speed.

I. The District Court correctly found that the stranding was solely caused by the negligence of the POTOMAC's master and watch officer. (Answering appellant's Points I, II, IV and V).

No matter how the POTOMAC may try to emphasize an unconfirmed detail in an unofficial document, she cannot overcome the fact that her master, Hansen, deliberately disregarded every piece of information and warning in his Sailing Directions, on his charts, specific cable advices and violated the local Vizerial Order which required that "a captain entering the area of compulsory pilotage service shall signal for the pilot immediately and maintain the

signal until the pilot arrives" (Ex. MM and translation MM-1, 498a).

The DMA published Sailing Directions specifically informed the POTOMAC's master that the compulsory pilotage area started at north latitude 33°37'40", and that pilots are available day and night (Ex. H, 470a-471a; Ex. MM-1).

The northern boundary line of the compulsory pilotage area has been marked and labelled "Lat. 33°37'40" N" on chart Exhibit 2 (305a). Clearly, it is 200 yards north of buoy CA5 and about 400 yards north of where the POTOMAC stranded (measurements on chart).

The POTOMAC's master, however, ignored it and the appellant, quoting incomplete evidence, attempts to argue that the POTOMAC's master "was not in violation of any compulsory pilotage rules" because there was only "harbor pilotage". (Pages 26 and 27 of appellant's brief.) Plaintiff's Exhibit 101, pages A1 and A2 show that the Director of the Port of Casablanca believed the contrary (324a-325a). Also, in quoting on pages 26 and 27 of its brief from Jungerheld's testimony, appellant omits important evidence. Concerning the area where pilots board incoming vessels, Jungerheld testified:

Q. By close by, what do you mean? A. Well, within 100 yards. *Although they'll—if there's a swell running they'll come up a mile to you.*

Q. You say by coming up, you mean north of CA-5? A. Yes, outside the port altogether." (280a-281a) [italicized evidence omitted in appellant's quote].

Also, see Jungerheld 284a-285a and the area labelled "Pilot" on chart Exhibit 2.

In the footnote on page 8, *supra*, we already pointed out that the claimed "harbor pilotage" quotation by appellee

lant on page 26 of its brief came from the 1959 French Sailing Directions that predate the Moroccan Vizerial Order of 1967 by eight years. We also pointed out that the French 1970 Sailing Directions say nothing about "harbor pilotage". Furthermore, the POTOMAC's own evidence is that after the stranding pilots left and boarded the POTOMAC in anchored position north of buoy CA5 on February 27th and 28th in heavier weather than on the day of the stranding (Hansen 257a-258a; Ex. E, the POTOMAC's bridge log book entries for February 27th and 28th; also see photograph, Exhibit CC, 489a, taken by mate Hunziker of the ship's chart, Ex. D, showing the erased original vessel's anchored position, and the later anchored position on the ship's chart, Ex. D).

Also, the appellant easily passes over the fact that the POTOMAC's master ignored two cable instructions to contact the Casablanca pilot station (Exs. V3 and V5, 480a, 482a; Hansen 203a, 204a, 508a, 525a). Also, see the Sailing Directions notation that "Vessels can communicate by day or night by the International Code" (Ex. H, 471a). The District Court correctly found that the POTOMAC did not follow this instruction (583a).

The District Court further found that Captain Hansen and watch officer Hunziker, never having been to Casablanca

"did little to behave with concomitant prudence by way of reference to available charts and instructions and, additionally, in speed and caution of approach." (Opinion 583a; see Hansen 191a; Hunziker 404a.)

Although, the approach chart, Ex. R, No. 51220, was on board the vessel, as the District Court found, it was not used in the POTOMAC's approach to Casablanca (Hunziker 408a, 412a; 584a). The POTOMAC used the smaller

scale ocean depth curve chart No. 51013 which did not show the approach line of buoys CA1, CA3 and CA5 in line from 3 miles out (Hansen 246a-250a; Hunziker 407a-408a; 412a; see Ex. R; finding 545a).

Moreover, plaintiff's own expert Wadleigh on cross-examination admitted that a navigator not familiar with Casablanca harbor should follow the approach line of the buoys CA1, CA3, then pass buoy CA5 by leaving it to starboard and then use the entrance range charted on the approach chart Ex. R, No. 51220 and the harbor chart, Ex. D, No. 51222 (Wadleigh 39a-41a). Even the POTOMAC's watch officer admitted it (Hunziker 414a-415a) and the District Court so found (545a). Hansen negligently did not do so.

Furthermore, the POTOMAC disregarded the Moroccan buoyage system which requires that a black buoy be left to starboard when entering (Ex. 103, 327a; Hunziker 423a, 424a; see Ex. B, Bowditch, pp. 977-982, 450a-456a). Hansen tried to excuse himself by saying that the buoy "first appeared to have red on it" that there "was rust on it but there was no clear marks . . ." (Hansen 197a). This could not be true as watch officer Hunziker testified:

"Q. Prior to the vessel stranding, did you observe buoy CA5? A. Yes, we did.

Q. What did it look like? A. It was a black can buoy with a light and a radar reflector.

Q. Was it solid black? A. Yes, it was" (Hunziker dep. Ex. 106, pp. 35-36).

Appellant then proceeds to argue that "In the absence of information in the Sailing Directions, POTOMAC's master properly *assumed* that the buoyage system was as displayed on Chart N.O. 51222", citing "467a-8a" (appellant's brief, pages 22-23). The appellant, however, omits the following evidence:

- (a) That buoyage systems are not shown on charts, only buoy colors (Wadleigh 34a-35a).
- (b) Hansen admitted that he had earlier seen on board the POTOMAC a pilot chart containing the buoyage systems of France, Morocco and other countries, such as Ex. 103, and that such a pilot chart would have been kept together with other navigational equipment (Hansen 243a-244a; Ex. 103, 327a).
- (c) POTOMAC's expert Wadleigh testified that such a pilot chart would and should be preserved (Wadleigh 42a-45a, 54a-55a).
- (d) Hansen admitted knowledge that in most European countries and France the buoyage system is opposite to the American system and that Morocco had been a French colony (Hansen 529a, 531a; cf. 264a).
- (e) Bowditch does contain a whole chapter on the various buoyage systems in the world, Ex. B, pp. 976-982, 450a-456a, and in describing the American system warns:

"This system does not always apply to foreign waters" (457a).

Moreover, the appellant's own expert Wadleigh testified that the POTOMAC's mariners should have ascertained the applicable buoyage system (Wadleigh 43a-44a). If in doubt, a simple communication with the pilot station would have provided that information. However, Hansen negligently ignored specific instructions to call the pilot station (see Exs. V3 and V5).

The statement in *Tebbs v. Baker Whitley Towing Co.*, 271 F. Supp. 529, 538 (D. C. Md. 1967), *aff'd*, 407 F.2d 1055 (4th Cir. 1969), a collision case, applies here:

"Here, as in other maritime situations, knowledge means not only personal cognizance but also the means of knowledge, of which a captain is bound to avail himself, of conditions likely to produce or contribute to a loss unless appropriate means are adopted to prevent it" (p. 538).

Hansen just *assumed* the American buoyage system without even looking at Bowditch, if his professed ignorance can really be believed (Hansen 207a; cf. 264a and Ex B, pp. 976-982 and particularly, p. 979). His watch officer Hunziker actually testified that initially they intended to leave buoy CA5 to their starboard (Hunziker dep. Ex. 115, p. 13). And there was evidence that the physical configuration of the breakwater and buoys on the approach chart, which the POTOMAC's navigators did *not* use, indicated to a mariner that buoy CA5 should be left to starboard (see Hunziker 414a-415a; Wadleigh 39a-41a; Jungerheld 286a). Also, see original Exhibit S where the recitations by Hansen of how he "originally" intended to pass buoy CA5 has been erased and rewritten.

Hansen's credibility was also cast in doubt by his attempt to write his log book only after telephone consultation with owners in New York (see Ex. QQ Hansen December, 1972 deposition, 522a-523a; Hunziker's letter Ex. DD, 491a; Hunziker dep. 41, 90-91; see Ex. UU; Unger dep. 45; and Hansen 236a-238a). But Hansen would not admit it until confronted by a photograph taken by Hunziker of the log book "as (Hunziker) was ordered to fill it out and sign it on the day of the grounding" (cf. Exs. DD at 491a; BB at 487a; E at 463a and Hansen 236a-238a showing Hansen's June 21, 1973 testimony before Hunziker's photograph of the log was shown to Hansen, — Ex. QQ1 Hansen 537a-538a). Attempts to change or embellish initial recordings of fact are usually castigated with full loss of credibility to the witness. See *Warner Barnes & Co. v.*

Kokosai Kisen Kabushiki Kaisha, 102 F.2d 450, 453 (2d Cir. 1939); *Larsen v. Cahill Towing Line*, 6 F.2d 932, 983 (2d Cir. 1925).

Hansen's credibility was further impaired by his original failure to recoillect in December 1972 that he had written any document or statement concerning the grounding to the Casablanca port authorities (cf. Ex. QQ Hansen December 1972 deposition 522a with Exs. RR4 and RR6 at 563a-564a). When copies of his letters to the harbor master and the harbor authority of the port of Casablanca written in February 1972 were finally "discovered" in May of 1973, Hansen finally had to admit that he had written them (Ex. QQ1 Hansen June 1973 deposition 547a and Exs. RR4, R6). It is interesting that in his report to the Casablanca harbor authorities, Hansen attempts to blame buoy CA5 being off station and the placing of "one or two large rocks . . . beyond their intended position", because there was sufficient depth on both sides of the vessel and pivoting while on the strand (Ex. RR-6, 564a).

In this connection, the appellant's charges on page 12 of its brief that the DMA published chart "was grossly inaccurate and a trap" is not fully consistent with the evidence. The direct testimony of the appellant's diver Lechartier was:

"Q. What did you find, Captain, on your under-water survey? A. So, arriving in the middle of my way of my swim on the bottom, I notice the depth, I see big blocks, not rocks, but blocks, old blocks, you see, with seaweeds, and I measure the depth here and after correction I found that the depth, if we refer to our system, was 9—8 to 9 meters of depth in this area. That was about at the middle, a little less than half of the distance, and I measured that when I came up, I had my supply boat and took good bearings on the shore, I did a good position of that place.

Q. Could you put that position on the chart, now?

A. Yes.

Q. * * * let's put an arrow to that and mark it.
'Position A,' Captain. 'A' as in Alpha. A. Alpha,
yes" (Lechartier 65a-66a; mark on Ex. 13A, 315a).

He then proceeded to explain that the actual extension of the submerged portion of the breakwater was 250 to 300 yards as follows:

"Q. Did you make an inspection between position 'A' and the end of the breakwater? A. Yes.

Q. What if anything did you find in that area?
A. Well, arriving at some 300 yards, 250 to 300 yards from the breakwater, I found also rocks with the depth reducing progressively to the surface" (Lechartier 66a).

The American chart did show a submerged section of 250 yards, precisely what Lechartier found (see Ex. D).

The blocks found by Lechartier, on which the POTO-MAC stranded 400 yards from the visible breakwater, were not known to anyone. Lechartier testified:

"Q. Captain Lechartier, in this survey that you made and found these rocks—— A. Yes.

Q. ——that you testified to, they are not shown on any French chart are they? A. No.

Q. Do you know whether they are shown on any British chart? A. British?

Q. British. A. British chart? I don't know. I don't think so because nobody knows there is these rocks.

Q. Did you advise any Hydrographic office of the existence of these rocks? A. I spoke with people of the public works, but remember I am a foreigner in Morocco and I have not to interfere in their affairs" (Lechartier 81a).

The District Court's finding that the POTOMAC stranded about 400 yards from the visible breakwater is not and can not be disputed (Opinion 587a; Log entry Ex. E, 463a; Hansen 209a; appellant's brief pp. 8-9; 0.2 of a mile equals 406 yards). Also, it can not be disputed that the American harbor chart, N.O. 51222, Ex. D is based on foreign charts and surveys, and none show the large concrete blocks on which the POTOMAC stranded (Lechartier 81a; Exs. D, 461a; 13, 313a; KK, 497a). Even the later French June 1971 chart, Ex. 13, does not show these concrete blocks.

Thus, the appellant's statement on page 12 that Anderson in preparing change 13 to the sailing directions in March 1970 "found from information received from Casablanca that the chart N.O. 51222 was in error . . ." is not completely correct and is quite misleading. Anderson specifically testified that the only document received from Morocco and considered an "official Moroccan source" did not extend the breakwater or the submerged section even as far as shown on the various charts (Anderson 392a). More specifically, his testimony was:

" * * * there is nothing in Exhibit 11, an official document, that extends the breakwater out to 3550, or even to its limit of the red danger arc" (Ex. 106, Anderson dep. p. 138).

Anderson was referring to the red danger sector of the Les Roches Noir light labelled A on Exhibit 2.

The only information that indicated a possible further extension was Exhibit 9, the unofficial privately published French port guide which "is not even a prime source material for France" (Anderson 392a). As Anderson explained, the information from this unofficial French port guide (not a document from Casablanca as appellant claims) was in conflict with every primary and secondary source material. See the French chart, Ex. 13, which does

not extend the underwater portion of the breakwater to the stranding; see Ex. KK, the British 1972 chart on which the underwater portion of the breakwater and the 6 fathom line are exactly the same as on the American chart; see the red sector of the Roches Noires Light as it appeared when Anderson reviewed the charts and even on the later French 1971 chart, Ex. 13; compare the change in the red sector of the light shown on Ex. 8 and copied on Exhibit 2 which was made by the Moroccans almost one-half year after the POTOMAC stranded in the summer of 1972 (McLoud 128a-129a; Anderson dep. 116-121). Furthermore, Lechartier's underwater survey showed large blocks about halfway (or 400 yards) between the visible breakwater and CA5, and an underwater extension of only 250 to 300 yards.

Therefore, Anderson could not recommend any chart change, or a notice to mariners in 1970, and a warning in the Sailing Directions that

"The outer extremity of the breakwater is submerged for a distance of 400 yards"

was proper and sufficient (Ex. H, p. 219, 469a; McLoud 127a-128a; Anderson 385a, 386a, 388a-389a, 393a, 397a). And, the District Court so found (589a-590a).

The appellant's plea for an additional notice to mariners is simply a "boot strap" argument. The fact is that following the receipt of Ex. 13, the French June 1971 chart in November 1971, the DMA made a comparison with the existing American chart, noted the differences and issued a notice to mariners in the first week of January 1972, correcting the American Harbor Chart Ex. D (Ex. 14, Ex. 109; Ex. 104; Uber dep. 9; Uber 337a-339a; McLoud 163a-165a). These corrections, although they contained two shoal spots and a light characteristic change in Casablanca were not made by the POTOMAC's navigators on their own chart (McLoud 122a-123a, 163a-165a; cf. Exs. 14, 109 with

ship's chart, Ex. D; and with Ex. 8 where the published corrections have been entered).

Moreover, there was ample evidence that the Sailing Directions warnings were sufficient to warn the POTOMAC from proceeding between the buoy and the breakwater. Jungerheld testified:

Q. Would you look through there and see if there's any warning similar to the one in plaintiff's Exhibit 112 with respect to the buoy and the end of the jetee?

A. Yes. Do you want me to read it?

Q. Yes, is there a warning? A. Yes, there's a buoy. 'A lighted whistle buoy equipped with a radar reflector is moored close off the seaward extremity of the submerged section of the breakwater forming the outer portion of Jetee Delure.'

Q. Does that say it's dangerous to pass between the buoy and the end of the jetee? A. It's moored close off the seaward extremity.

Q. What does, 'Close off', mean to you? A. It means that I would not attempt to ever go in between there."

Hansen admitted understanding that buoy CA5 was the lighted whistle buoy referred to in the Sailing Directions close off the seaward extremity of the submerged section of the breakwater (Hansen 536a); that he had never measured the 400 yards submerged section on the chart and that:

"If I had stepped off and noticed the extension was 400 yards I wouldn't have gone in . . ." (Hansen 221a).

Similarly, the watch officer admitted that the 400 yards extension just "did not register" in his mind at the material time (Hunziker, 419a-420a).

With such evidence, the District Court properly found:

"With respect to the Sailing Directions, also published by DMA, which, though on board, could not have been read too carefully by either the master or the watch officer" (585a).

Although findings of negligence are not protected by the "clearly erroneous" test of Rule 52a of the Federal Rules of Civil Procedure, such findings are entitled to great weight, *In re Marine Sulphur Queen*, 460 F.2d 89, 97-98 (2d Cir. 1972).

And, the evidence fully justified the clear findings of negligence summarized in the opinion (see 589a-590a).

With the clear notation "work in progress" on the harbor chart, the survey dates on the chart, the notations in the Sailing Directions, and the ability to observe loose rocks and blocks piled up at the visible extremity of the breakwater (see Lechartier 94a) the POTOMAC's navigators knew or should have known that they were heading for danger. Known dangers may not be ignored. *Chemical Transporter, Inc. v. M. Turecamo, Inc.*, 290 F.2d 496, 497-498 (2d Cir. 1961); *The Sanday*, 122 F.2d 325 (2d Cir. 1941); *The Cornelius Vanderbilt*, 120 F.2d 766, 768 (2d Cir. 1941); *Crawford v. Indian Towing Company*, 240 F.2d 308, 311 (5th Cir. 1957).

Vessels must avoid not only collisions and groundings but they must avoid the risk of grounding, which embraces "the duty to keep away by a prudent and safe margin, having reference to all the contingencies of navigation", *Lady Nelson v. Creole Petroleum Corporation*, 224 F.2d 591, 594 (2d Cir. 1955), cert. den., 350 U.S. 935 (1956), citing *The Aurania and The Republic*, 29 Fed. 98, 125 (SDNY 1886). Also, see *The Laura V. Rose*, 28 Fed. 104, 108 (SDNY 1886); see *Griffin on Collision*, § 259, p. 596.

Sailing directions are written by mariners for mariners to proceed from one pilot station to the other pilot station (McLoud 102a-103a; Anderson 344a-346a, 393a-397a). Together with charts they are intended to aid the mariner, not to take him by the hand and lead him from place to place. The mariner must use some judgment.

The appellant quotes on page 27 of its brief testimony of its own expert Wadleigh as not criticizing Captain Hansen. Appellant, however, omits to state the subject of inquiry to which Wadleigh was responding, to wit, "How would you proceed into the port" and "How would you enter Casablanca . . . ? (50a-53a). Significantly, Wadleigh stopped with "up to the point of a very close approach to buoy CA5", and said nothing about passing between the buoy and the breakwater (Wadleigh 53 and 54a). Also, Jungerheld testified:

"Q. . . . Captain, would you ever navigate your vessel to pass between the breakwater and buoy CA-5? A. That would be very imprudent seamanship.

Q. Why do you say that? A. Because that buoy is there for a purpose. It indicates, and sailing directions tells you, there's underwater—they're extending the breakwater" (Jungerheld 286a).

This is consistent with Anderson's explanation that Sailing Directions, written by mariners for mariners, need not say "Mariner, do not run your ship upon the breakwater between the buoy and the breakwater" (Anderson 396a-397a; see Jungerheld 293a-294a). But that is what appellant seeks by this law suit, trying to recover damages caused by the POTOMAC's negligent master.

The District Court's findings were amply supported by the evidence and a mistake was not committed in adjudging

the POTOMAC's navigators solely at fault for the stranding. See *McAllister v. United States*, 348 U.S. 19 (1954).

II. The District Court did not err in finding that the POTOMAC failed to use the proper charts for approaching Casablanca, and that she proceeded at an imprudently excessive speed (Answering appellants Points III and VI).

The appellant's "clearly erroneous" argument regarding the POTOMAC's failure to use the proper charts is based on failure to fully reflect the District Court's findings, which were:

"This court finds that ordinarily prudent navigators of United States flag ships in 1972, commonly used two charts published by (DMA),* one now known as No. 51220 (formerly HO3776), an approach chart, and No. 51222 (formerly HO3777), the harbor chart. For whatever reason, although the approach chart, No. 51220, was aboard the POTOMAC on February 26, it was not consulted or studied by the master or watch officer; this omission, in the judgment of the undersigned, was significant because No. 51220 was the preferable chart, of all the charts aboard, for prudent navigation into Casablanca Port. That approach chart shows an approach line of buoys, CA1, CA3 and CA5, respectively, 3 miles out from the inner harbor, 1.5 miles out, and at the entrance to the harbor; an entrance range course of 228 degrees true; and an entrance course south and east of buoy CA5. To the detriment of the POTOMAC, this course was not followed.

According to Hansen and Hunziker, they apparently used another chart, No. 51013 (the ocean depth

* The abbreviation "DMS" in the original is an obvious typographical error.

curve chart), published by DMA showing the north-west coast of Africa in general but not relating in particular to the approaches to Casablanca Port. They also appear to have referred to the aforesaid harbor chart, No. 51222. Chart No. 51013 does not show the aforementioned buoy range, and chart No. 51222 shows only buoy CA5 and the entrance range course of 228 degrees true (opinion 584a).

These findings are solidly based. A brief glance at the harbor chart, Ex. D, N.O. 51222, shows that it only covers the area about one mile north of buoy CA5 (461a). The POTOMAC could not navigate on it when the POTOMAC's master noted "Arrival" three miles from the breakwater (see log entry and deck bell book entry, Exs. E and K, 463a, 474a). The watch officer confirmed that he did not use the approach chart, Ex. R, but did use the ocean depth curve chart N.O. 51013 which does not show the three buoys in line, nor the entrance range (Hunziker 407a-408a, 412a; see Hansen 248a-250a, Tr. 220-221). Also, note that there are no position marks on the approach chart, Ex. R, save the one Hansen made during a deposition, transferring it from the ocean depth curve chart No. 51013 (Hansen 247a-248a).

Plaintiff's expert Wadleigh, admitted that use of the approach chart, N.O. 51220, together with the harbor chart, N.O. 51222, indicates entrance into the harbor east of buoy CA5, because the approach chart shows the approach buoys (Wadleigh 41a). McLoud confirmed it, and so did watch officer Hunziker (McLoud 138a, 165a; Hunziker 414a-415a).

No one disputes that the larger scale harbor chart, N.O. 51222 Ex. D, should be used in harbor navigation. But, the POTOMAC got herself on the wrong track, so to say, because she did not use the approach chart first, when it was applicable. And that is what the District Court found.

The appellant's lumping together of two different findings into one apparent sentence in the quote on page 21 of its brief is misleading. Especially when the appellant should realize an obvious typographical error on page 589a of the opinion,—the "approach chart No. 51222" should read "approach chart No. 51220." They were properly and correctly distinguished earlier in the opinion. With this "correction" the appellant's arguments obviously fall. Clear typographical errors are not a ground for reversal, see Rule 60(a) of the Federal Rules of Civil Procedure.

The full reading of the opinion shows that the first sentence partially quoted by the appellant is a general statement of the negligence of the POTOMAC's master and watch officer "as they performed their navigation in approaching the harbor on February 26, 1972" (588a). Thereafter, on page 589a, follows a listing of the numerous negligent acts which include: excessive speed, failure to wait for the pilot, violation of local regulations, failure to ascertain the local buoyage system, passing between buoy CA5 and the breakwater despite the Sailing Directions warning, failing to use the *approach chart No. 51220* and cutting too close to the visible breakwater (400 yards) when the chart indicated "work in progress" at the end of the breakwater and the Sailing Directions warned of a 400 yard submerged section. For each and every one of these findings there is overwhelming evidence establishing that a prudent navigator should not have committed any of these negligent acts but that the POTOMAC's navigators are guilty of each and every one of them (see Point I *supra*).

With respect to the vessel's speed, at the time of the stranding, 9 knots is probably a little more than the POTOMAC was doing. However, appeal courts do not artificially isolate a single step in the trial court's reasoning, see *American President Lines, Ltd. v. Towboat Seneca*, 384 F.2d 511, 514-515 (2d Cir. 1967), where an error in a

vessel's speed calculation was held not to be grounds for reversal.

The District Court's finding that the POTOMAC approached the harbor with excessive speed is correct and fully supported by the evidence. The appellant's statement on page 29 of its brief that "The speed at which the POTOMAC approached Casablanca was no different than that described by the United States' own expert (A. 284a, 305a)," is not correct. Jungerheld testified:

"Q. You have drawn one line and you have stopped. A. Yes.

Q. Well— A. Actually I'm going dead slow up in here.

Q. By 'Up in here' there's a marking over there, right? A. Yes, on the approach I am going dead slow, because you can't see stuff coming out of here and you don't want to get mixed up in traffic. Usually you have ships anchored in here, too.

Q. Let me just interrupt you and get this on the record. Will you mark this here where you mention dead slow? Just write 'Dead Slow' in the area that you pointed to.

Mr. Schulmeisters: Let the record show that the Captain has marked in black pen the words, 'Dead Slow,' at the northerly end of the black line that he just drew" (Jungerheld 284a).

His testimony clearly means that he would be proceeding at dead slow speed through the water at the position indicated on chart Exhibit 2. This is quite different from having the vessel's engines stopped but actually proceeding through the water at a much greater speed of about 12 knots.

The place where Jungerheld would proceed dead slow because of anchored ships and inability to see outbound

traffic from the harbor is a little less than 500 yards from the 1537 stop engine position. (See chart Ex. 2 at 305a). The testimony is quite clear and even the appellant admits on page 28 of its brief that at 1537 hours the POTOMAC was proceeding at 12 knots through the water (Hansen 513a-514a, 551a). Also, it is quite clear that the POTOMAC weighed 13,858 gross tons and carried 22,637 long tons of cargo thus weighing nearly 36,500 tons (Ex. O, see 581a-582a). There was considerable momentum driving the vessel forward.

The dead slow speed of the POTOMAC would have been 20 revolutions per minute, or 3.45 knots theoretical speed or approximately 3 knots through the water (Hansen 228a-229a, 515a, 559a-560a; Lechartier 95a). Obviously, the POTOMAC was not going dead slow over the ground 500 yards after she stopped her engines. In any event, Hansen admitted that it would take about 30 seconds to have the propeller stopped (Hansen 515a, 516a). Proceeding at 12 knots, or 1,200 feet per minute, in the 30 seconds that it took the propeller to stop and the vessel to start slowing down, the POTOMAC would have already travelled 600 feet, or almost half way to the point where the expert Jungerheld said the vessel should be proceeding at dead slow speed or 3 knots through the water.

Furthermore, we are compelled to take issue with plaintiff's calculation of an average speed of 8 knots by using the distance of 1.6 miles (see appellant's brief, p. 28). The 1.6 mile distance is a direct measurement from the 1537 stop position to the end of the visible breakwater. The POTOMAC did not travel along that line. The POTOMAC actually proceeded along the course of approximately 125° true and then turned to the right when approximately 900 yards from buoy CA5, thereafter stranding on the concrete blocks 400 yards to the east of the visible breakwater (see the course line and pencil sketch on Exhibit D).

That distance comes to 1.75 miles, and as Hansen computed it, an average speed of 8.7 knots (Hansen 259a).*

She could not have "moved at 4-6 knots" at the stranding. A 36,500 ton vessel will not lose 6 to 8 knots of speed in good weather in 4 minutes. Furthermore, the 1541 slow ahead bell, at 40 RPM, gave the vessel a theoretical push for 6.9 to 7 knots (Hansen 559a-560a) and the engine bell book, Ex. M (475a) indicates "stop" and "half astern" orders, attempting to slow down, shortly before the stranding. Clearly, her speed was excessive.

With respect to the POTOMAC's arrival time, the agent testified to a message in his file concerning the POTOMAC's attempt to arrive at 1300 hours (Decnop 568a-569a). On February 24th the agent cabled the vessel that:

" * * * Regarding berthing same is not guaranteed if vessel arrives too much late after high tide 1244 so please do best" (Ex. V-5).

And the Casablanca port director's letter states:

"In addition, the entering time scheduled by the Harbor Master, which had been established with due consideration to the tide and to the draft of the *SS Potomac*, was disregarded by the captain, who arrived when the tide was half way out" (Ex. 101, 325a).

* 1.75 miles equals 10,640 feet and divided by 12 actually gives 8.86 knots. But, this only shows that over short distances speed calculations with time intervals only to the nearest minute have an inherent error. For example, if the time interval actually were 11.5 minutes [say the actual stop order being given or executed at 1537½ hours, see Hansen 515a] then the average speed would be 9.25 knots, with concomitant decrease to 8.5 knots in 12.5 minutes. Hence, the District Court's finding of a speed equivalent to 9 knots at stranding is substantially within reason. Even 6, 7 or 8 knots would be excessive speed considering the small sail boat traffic, anchored vessels, outbound traffic and lack of pilot, see Exhibits S at 479a, J at 473a and 18A at 315a.

Also, there was evidence of the agent and owner considering overtime work, oncoming local holidays and radio telephone communications between the vessel and the agent (see Exs. UU-1 and UU-3, 579a, 580a; Hansen 203a-204a; 525a, 545a).

In sum, there is ample evidence to sustain a finding of excessive speed under the circumstances, the inability to stop to permit the outbound vessel to pass, and an attempt to force an entry into the harbor without waiting for the pilot who, unknown to the POTOMAC, actually was on his way to meet the vessel north of buoy CA5 (see Deenop 573a; Ex. TT-60, 577a; Hansen 204a-206a; Jungerheld 280a-281a, Ex. 2). Moreover, the POTOMAC's excessive speed is just another one of the many negligent acts of her navigators.

CONCLUSION

The District Court correctly found the POTOMAC's navigators negligent and solely at fault for the stranding. The judgment should be affirmed with costs to the appellee United States of America.

Respectfully submitted,

CARLA A. HILLS
Assistant Attorney General

PAUL J. CURBAN
United States Attorney

GILBERT S. FLEISCHER
Attorney in Charge
Admiralty and Shipping Section
New York

JANIS G. SCHULMEISTERS
Attorney
Admiralty and Shipping Section
New York
Department of Justice
Attorneys for the United States
of America